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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ROBERT CONATSER, Defendant and Appellant.	C060502 (Super. Ct. No. CR025149)

A jury found defendant Steven Robert Conatser guilty of transportation of a controlled substance, possession of a controlled substance, being under the influence of a controlled substance, possession of less than an ounce of marijuana, and driving a motor vehicle while under the influence of a drug.

The probation report recommended three years' probation. The trial court recognized, however, that defendant was ineligible for probation based on his two prior felony convictions, and the court did not find the "unusual case" exception to probation ineligibility met. (Pen. Code, § 1203,

subd. (e)(4).) The court sentenced defendant to the middle term of three years in prison.

On appeal, defendant contends the trial court abused its discretion by imposing a prison term rather than granting him probation. We conclude the court did not err in denying probation and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

One afternoon in October 2007, Lassen County Deputy Sheriff Ronald D. Zielen was on patrol and heading westbound on Highway 36 when he saw "a couple of vehicles traveling eastbound that looked like they had been pushed over towards the shoulder of the roadway." When Deputy Zielen examined the situation "a little closer," he saw a blue Dodge pickup traveling westbound, approximately four or five car lengths ahead of him, "get into the eastbound lane, try to make a pass and cause another vehicle off [the road] towards the shoulder." Subsequently, Deputy Zielen pulled over defendant for passing unsafely.

Once on the side of the road, defendant "appeared to be nervous," but claimed he had nothing illegal and consented to a search of the vehicle. During the search, Deputy Zielen found "a white powdery type substance" in clear plastic baggies. As a result of this discovery, Deputy Zielen requested a narcotics detective respond to the scene. While they waited for the narcotics detective, defendant admitted the baggie contained methamphetamine and claimed he took it to help "ease his pain for his disease," but he could not remember what the disease was.

Lassen County Narcotics Detective Jeffrey Schwagerl arrived at the scene and noticed defendant was extremely nervous, his speech was rapid, his eyes were very bloodshot, and he was leaning back on the front of the patrol vehicle. Defendant was very fidgety with his feet and arms, crossing and uncrossing them. Before defendant was transported to the jail, Detective Schwagerl took possession of 1.3 grams of methamphetamine, 4.7 grams of marijuana, an electronic scale, and a smoking pipe -- all found in defendant's vehicle.[1]

At the county jail, defendant admitted to using methamphetamine and marijuana around 2:00 p.m., and a toxicology screen of his urine confirmed his admission. Defendant also admitted he used methamphetamine on a daily basis for approximately the last six months.

After a jury found defendant guilty on all counts, the Lassen County Probation Department filed a probation report noting that defendant had a criminal history consisting of several misdemeanors, a felony conviction for forgery in October 1993, and a felony conviction for burglary in June 1995. Although the probation officer recognized defendant was

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[1] There is a discrepancy between the clerk's transcript and the reporter's transcript as to the amounts of methamphetamine and marijuana found in defendant's vehicle. On the record, Angela Stroman testified and both parties stipulated there were 1.02 grams of methamphetamine and 3.55 grams of marijuana found in defendant's vehicle. Nevertheless, the amounts of methamphetamine and marijuana are not factors in our reasoning and have no bearing on our decision.

presumptively ineligible for probation based on his two prior felonies, without arguing or giving detail about how this was an unusual case, the probation report recommended the sentence be suspended and defendant be placed on probation for a period of three years. (See Pen. Code, § 1203, subd. (e)(4).)

At the sentencing hearing, without arguing or giving detail about how this was an unusual case, defense counsel requested the court follow the probation report. Without further objection, the court denied defendant's application for probation, stating defendant was statutorily ineligible for a grant of probation under Penal Code section 1203, subdivision (e)(4). The court noted as follows: "The only exception to that [rule] is if the Court finds facts to show this is an unusual case where the interests of justice will be served by a grant of probation. Here there are no such facts. Defendant is a previously twice-convicted felon with [o]ne five-year prison term proceeded by a lengthy record of theft offenses, and he previously was not successful on a grant of felony parole. His health problems do not make this an unusual case."

The court found no factors in either aggravation or mitigation affecting the court's exercise of discretion in sentence selection and imposed the middle term of three years in prison with two concurrent six-month sentences.

DISCUSSION

Defendant contends the trial court abused its discretion when it declined his request for probation and sentenced him to prison. He asserts the trial court failed to consider all the

relevant factors before deciding this was not an unusual case. In essence, however, defendant urges us to reweigh all the relevant factors. That is not our task under the applicable standard of review.

Because defendant had two prior felony convictions (the 1993 forgery conviction and the 1995 burglary conviction), there is no dispute he was presumptively ineligible for probation under Penal Code section 1203, subdivision (e)(4).[2] To determine whether the statutory presumption against probation has been overcome, the court must determine whether the case is unusual using the criteria set forth in rule 4.413 of the California Rules of Court.[3] (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 830 [construing former rule 4.13].)

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[2] Penal Code section 1203, subdivision (e)(4) reads in relevant part as follows: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony."

[3] All further rule references are to the California Rules of Court.

Rule 4.413(b) and (c) provides as follows:

"(b) [Probation in unusual cases] If the defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' or a substantially equivalent provision, the court should apply the criteria in subdivision (c) to evaluate whether the statutory limitation on probation is overcome; and if it is,

the court should then apply the criteria in rule 4.414 to decide whether to grant probation.

"(c) [Facts showing unusual case] The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

"(1) *Facts relating to basis for limitation on probation*

"A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

"(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

"(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

"(2) *Facts limiting defendant's culpability*

"A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

"(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

"(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

"(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

Rule 4.413(c) is to be read narrowly, so its exception to the statutory limits on probation does not swallow the rule. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178.) Even if a fact listed in rule 4.413(c) exists, however, this does not necessarily show that the case is unusual; the trial court may find it so, but need not. (*Stuart*, at p. 178.) The decision whether the case is "unusual" under Penal Code section 1203 is within the discretion of the trial court. (*People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 831, citing *People v. Cazares* (1987) 190 Cal.App.3d 833, 837.)

We review the court's determination under the abuse of discretion standard, which requires more than a showing that reasonable people might disagree with the court's ruling: it requires the defendant to show that the ruling was irrational or arbitrary. (*People v. Stuart*, *supra*, 156 Cal.App.4th at pp. 178-179, citing *People v. Carmony* (2004) 33 Cal.4th 367, 377.) On appeal, "[o]ur function is to determine whether the respondent court's order is arbitrary or capricious, or '"exceeds the bounds of reason, all of the circumstances being considered."' [Citation.]" (*People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 831.) The burden is on the party attacking the sentence to show clearly that the sentencing decision was irrational or arbitrary. (*People v. Cazares*, *supra*, 190 Cal.App.3d at p. 837.)

Defendant contends the facts of his case meet the exceptions of rule 4.413(c)(1)(A) (similar crimes), (c)(1)(B)

(remoteness), and (c)(2)(B) (mental treatment). We are not persuaded.

I

Prior Similar Crimes And Mental Treatment

(Rule 4.413(c)(1)(A), (c)(2)(B))

At the outset we dispose of defendant's cursory arguments as to why the court abused its discretion in failing to find this was an unusual case under rule 4.413(c)(1)(A) and (c)(2)(B). As to rule (c)(1)(A), defendant simply states this subdivision is "wholly applicable" and notes the bare minimum facts regarding the type of convictions (i.e., forgery and burglary) he sustained and his lack of a record since then, notwithstanding his current offenses. This bare-bones argument is not sufficient to show an abuse of discretion. Defendant fails to demonstrate the "fact or circumstance giving rise to the limitation on probation," i.e., his prior forgery and burglary convictions, was "substantially less serious than the circumstances typically present in other cases involving the same probation limitation." (Rule 4.413(c)(1)(A).) He also fails to mention he had intervening misdemeanor convictions between the forgery and burglary convictions. On this record, defendant's argument under rule 4.413(c)(1)(A) fails.

Defendant's cursory argument under rule 4.413(c)(2)(B) similarly fails. His three-sentence argument states, without citation to authority, that he acted out of "necessity" "to effect self-medication," and the court did not consider the "significant amount of information that led the probation

officer to conclude that this was an unusual circumstance case." Even if these assertions were true (although we have no evidence in the record they are), defendant still did not carry his burden to show an abuse of discretion. He fails to address the second prong in (B), which is a showing of a "high likelihood that [he] would respond favorably to mental health care and treatment that would be required as a condition of probation." (Rule 4.413(c)(2)(B).) On this record, defendant's argument under rule 4.413(c)(2)(B) also fails.

We are then left with defendant's argument under rule 4.413(c)(1)(B).

II

Remoteness (Rule 4.413(c)(1)(B))

Defendant claims the crimes currently before the court are "much less serious than his previous crimes" and a substantial amount of time has passed because there was more than a 12-year span between his last conviction and the current offenses. (Rule 4.413(c)(1)(B).) We disagree.

Defendant was convicted of two felony and three misdemeanor offenses involving the transportation and possession of a controlled substance and being under the influence of a controlled substance while driving a motor vehicle. Defendant contends his current offense for driving a motor vehicle while under the influence of a drug is much less serious than his previous felony convictions for forgery and burglary because it is only a misdemeanor. Defendant admits, however, he placed a number of people in serious danger by driving under the

influence of methamphetamine and marijuana and conducting unsafe passing maneuvers. The fact defendant did not actually injure or kill anyone does not make the offense any less serious or the situation any less dangerous.

Defendant makes a similar argument for his conviction of being under the influence of a controlled substance. A conviction of being under the influence of a controlled substance is serious enough, however, to result in a prison sentence in this case. In addition, defendant was convicted of two felonies and given a three-year prison sentence for one of them. Without citing to authority, defendant contends the "crimes of forgery and burglary necessarily involve victims whereas the drug crimes . . . do not." This does not help the defendant carry his burden of proof. Defendant claims he was punished for his prior crimes for a period longer than he was for either of the current drug convictions, indicating society and the Legislature believe his prior felonies to be "of the more serious variety." Only one of defendant's prior felony convictions, however, resulted in a prison term that is longer than defendant's current three-year sentence for transportation of a controlled substance, not both.

Furthermore, defendant argues he has been "free from incarceration and serious violations of the law for a substantial time before the current offenses," but this is not wholly true. (Rule 4.413(c)(1)(B).) Defendant failed to note his 1995 burglary conviction was followed by a five-year prison term, which would make the amount of time that he has been "free

from incarceration" less than 12 years. Defendant does not make the claim that less than 12 years is substantial.

Defendant has not shown the trial court abused its discretion when it found this was not an unusual case and denied probation.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.